

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**RLI INSURANCE COMPANY**

**APPELLANT-RESPONDENT,**

**v.**

**SOUTHERN UNION CO., D/B/A  
MISSOURI GAS ENERGY**

**RESPONDENT-APPELLANT.**

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DOCKET NUMBER WD71851 Consolidated with WD71874 and WD71972

DATE: May 31, 2011

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Appeal From:

Buchanan County Circuit Court  
The Honorable Weldon C. Judah, Judge

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Appellate Judges:

Division Two: James M. Smart, Jr., Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge

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Attorneys:

Nikki Cannezzaro, Kansas City, MO, for appellant-respondent.

David R. Schlee, Vincent R. McCarthy and Truman K. Eldridge, Jr., Kansas City, MO, for respondent-appellant.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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No. WD71851 Consolidated with WD71874 and WD71972

Buchanan County

Before Division Two: James M. Smart, Jr., Presiding Judge, Mark D. Pfeiffer, Judge and  
Cynthia L. Martin, Judge

This is an appeal by RLI Insurance Company (as the assignee of its insured, Triumph Foods LLC) from the trial court's order granting partial summary judgment in favor of Missouri Gas Energy and against Triumph on Triumph's claim to recover subrogation damages measured by the amount paid by RLI on a builder's risk policy of insurance following a natural gas explosion that damaged a hog processing plant that was under construction. RLI contends that the trial court erred: (1) because the contract between Triumph and MGE did not include a waiver of subrogation clause and exclusively governed the relationship between the parties, preventing MGE from claiming third party beneficiary status under another contract; and (2) because MGE was not an intended third party beneficiary to the waiver of subrogation provision contained in a standard form AIA construction contract entered into between Triumph and various trades who participated in the construction of the plant.

**AFFIRMED**

Division Two holds:

(1) The trial court's partial summary judgment order became a final, appealable judgment upon the trial court's subsequent entry of a final judgment dismissing Triumph's claims without prejudice. Collectively, the partial grant of summary judgment, in combination with the document designated "final judgment," disposed of all issues as to all parties, leaving nothing for the trial court's future determination. Though the final judgment dismissed without prejudice counts asserted by Triumph which sought the recovery of subrogation (and other) damages, the final judgment did not expressly or impliedly operate to withdraw the trial court's earlier interlocutory order substantively disposing of subrogation damages as an available measure of damage given MGE's affirmative defense that subrogation rights had been waived.

(2) A natural gas transportation contract between MGE and Triumph which obligated MGE to provide natural gas service to the plant did not contain a waiver of subrogation provision, and was otherwise silent on the subject of the right of subrogation. Thus, the transportation contract did not bar MGE from claiming that it was an intended third party

beneficiary to a waiver of subrogation provision contained in a separate contract between Triumph and other trades who participated in the construction of the plant, even though the transportation contract contained an "integration" clause.

(3) A third party beneficiary is one for whose benefit a promise is made in a contract. Though not a party to the contract, a third party can sue to enforce the contract if the contract terms clearly express the intent to benefit the third party or an identifiable class in which the party is a member.

(4) The AIA contract entered into between Triumph, a construction manager hired by Triumph, and various trades who participated in the construction of the plant, expressly identified "Triumph's other contractors and own forces" as a class of persons intended to benefit from the waiver of subrogation provision.

(5) Triumph's "other contractors and own forces" was defined in the AIA contract as someone undertaking activities on Triumph's behalf relating to the "construction or operations" of the plant.

(6) MGE was required to construct and install a natural gas pipeline to the plant, and to set meters and other equipment, in order to perform under its natural gas transportation contract with Triumph. MGE's activities involved "construction or operations" related to the plant. MGE was, therefore, one of Triumph's other contractor's or own forces, and was within the intended class of third party beneficiaries to the waiver of subrogation clause.

Opinion by Cynthia L. Martin, Judge

May 31, 2011

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